IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No. 459

ETHEL KRESBERG,

Petitioner,

against

INTERNATIONAL PAPER COMPANY.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF OF INTERNATIONAL PAPER COMPANY IN OPPOSITION

RALPH M. CARSON,
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International Paper Company.

New York, October 11 1945.

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Opinions Below

The opinion of the District Court for the Southern District of New York (R 35-9) is not reported. The opinion of the Circuit Court of Appeals for the Second Circuit (R 50) is reported in 149 F (2d) 911.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered June 28 1945 (R 55). The petition for a writ of certiorari was filed September 27 1945. The jurisdiction of this Court is invoked under § 240(a) of the Judicial Code as amended by the act of February 13 1925.

Question Presented

Is a Massachusetts trust, formed by declaration of trust pursuant to the common law but having most of the

attributes of a corporation formed pursuant to statute, a "corporation" within the meaning of the "assignee clause" (Judicial Code § 24) limiting the jurisdiction of the District Courts of the United States?

Statute Involved

Judicial Code § 24, 28 USC § 41, provides in part:

> "*Original jurisdiction.* The district courts shall have original jurisdiction as follows:
>
> (1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of the same State claiming lands under grants from different States; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment has been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section." (Underscoring supplied)

The sentence underlined in this quotation is the so-called "assignee clause". The words "if such instrument be payable to bearer and be not made by any corporation", were inserted by the act of March 3 1887, 24 Stat. 552.

Statement

The sole question tendered by the petition is the scope of jurisdiction of the Federal courts. Jurisdiction is predicated by the complaint upon diversity of citizenship, the petitioner being a citizen of Florida and the defendant a New York corporation (R 8-10). The suit is upon bearer instruments (not foreign bills of exchange) of which petitioner is a subsequent holder (R 21). Petitioner does not claim that diversity of citizenship existed between the defendant and the original holder of the instruments in suit (petition p. 2). The record affirmatively shows that there was no diversity of citizenship between defendant and the original holders of the entire issue of debentures involved, since those original holders were all New York corporations (R 22-5).

The application for certiorari is predicated upon the contention that International Hydro-Electric System, a Massachusetts trust, is as a matter of law a "corporation" within the meaning of the jurisdictional statute, in that "while not chartered as a corporation" (petition p. 2), it is a quasi-corporation.

Argument

1. *The canons of construction uniformly applied on questions of Federal jurisdiction forbid judicial extension of that jurisdiction to a quasi-corporation.*

The Second Circuit Court of Appeals rightly concluded that the strict construction of their statutory jurisdiction

by the Federal courts forbids the inclusion of quasi-corporations with corporations in the class of entities whose securities in bearer form may be made the subject of suit in the Federal courts without the showing of original diversity of citizenship. To call the International Hydro-Electric System a quasi-corporation is to say that it is *not* a corporation, although similar to one. This Court said in *School District* v. *Insurance Company*, 103 US 707, 708:

> "What is meant by the words '*quasi* corporation,' as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special."

The word "quasi", which literally means "as if", is defined in Bouvier (Rawle's 3rd Revision, Vol. 3, p. 2780) as follows:

> "A term used to mark a resemblance, and which supposes a difference between two objects. Dig. 11. 7. 1. 8. 1. . . . It is exclusively a term of classification. Prefixed to a term of Roman law, it implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a strong superficial analogy or resemblance. It negatives the idea of identity, but points out that the conceptions are sufficiently similar for one to be classed as the equal of the other; Maine, Anc. Law 332."

That the characterization of the International Hydro-Electric System as a quasi-corporation is as far as petitioner could possibly go in assimilating it to the statutory term "corporation", is clear from the Massachusetts cases

to which the Court of Appeals calls attention (149 F [2d] at 913; R 53), distinguishing business trusts from corporations. In *Coolidge* v. *Old Colony Trust Co.*, 295 Mass. 515, for instance, the Massachusetts court said:

> "Such a trust is not a corporation and it is not organized under the laws of this Commonwealth."

To the same effect are 8 Thompson on Corporations § 6736; 3 Cook on Corporations p. 2249.

Under these circumstances, the canons of construction with respect to jurisdiction which this Court has often and indeed recently laid down, forbid the extension of the statutory term "corporation" to include Massachusetts trusts. For the rule of strict construction we may merely refer to *Indianapolis* v. *Chase National Bank*, 314 US 63, 76-7; *Thomson* v. *Gaskill*, 315 US 442, 446; *Healy* v. *Ratta*, 292 US 263, 270.

2. There is no diversity among the Circuit Courts on this question.

While the foregoing considerations are in our submission controlling, petitioner bases her principal argument upon the contention that the holding of the Second Circuit Court of Appeals herein conflicts with the decision of the Eighth Circuit Court of Appeals in *Scott County* v. *Advance-Rumley Thresher Co.*, 288 Fed. 739, and that of the Sixth Circuit Court of Appeals in *Bloomfield Village Drain District* v. *Keefe*, 119 F (2d) 157. It does not appear that application for certiorari was made in either case.

In reality neither case is authority for petitioner's contention here. Both involved juridical entities created pursuant to statute of the State. The *Scott County* case was

an action on bearer warrants of an Arkansas county, of which warrants plaintiff was the assignee. As against the defendant county's contention that it was not a corporation because an act of the Arkansas legislature passed in 1879 had repealed Arkansas statutes "making counties corporations. . .", the Eighth Circuit Court of Appeals noted that counties as a matter of general law are public corporations and that the act of 1879 had not changed the essential character of the entities previously recognized to be corporations (288 Fed. at 743, 744). In the *Bloomfield* case there were involved bearer bonds of drain districts created under the statutes of Michigan for agricultural purposes. While the Michigan constitution and statutes did not (as did the Arkansas law prior to 1879) actually denominate the entity involved as a corporation, the Sixth Circuit Court of Appeals found upon the reasoning of cases cited in its opinion (119 F [2d] at 161) that "a drain district exhibits the essential characteristics of a public corporation". It then dismissed the action on another ground.

Thus neither of these cases rises to the level of creating a conflict with the decision of the Second Circuit Court of Appeals herein.

3. Under the rule of strict construction, controlling effect attaches to the fact that Congress has in various statutes explicitly enlarged the term "corporation" when it wished to include therein entities like business trusts.

The phrase "any corporation" in Judicial Code § 24 has stood unchanged in that act since 1887 although the section has been from time to time amended, the last time in 1940. When, however, Congress wished to enlarge the concept of "corporation" to be applied in various statutes,

it has found no difficulty in doing so. Although the Bankruptcy Act of 1898, c. 541 § 1, 30 Stat. 544, contained a broad definition of the term "corporation", nevertheless in 1926 Congress added the following (Act of May 27 1926, c. 406, § 1, 44 Stat. 662):

> ". . . joint stock companies, unincorporated companies and associations, and any business conducted by a trustee, or trustees, wherein beneficial interest or ownership is evidenced by certificate or other written instrument."

The Internal Revenue Code, 26 U S C § 3797 (3), defines the term "corporation" when used in that Code as including associations, joint-stock companies, and insurance companies.

The Federal Trade Commission Act, having originally defined "corporation" as meaning "any company or association incorporated or unincorporated . . ." (Act of September 26 1914, c. 311, § 4, 38 Stat. 719), was amended in 1938 to include within that definition "any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated . . ." (Act of March 21 1938, c. 49 § 2, 52 Stat. 111; 15 USC § 44).

"Corporation" is defined for purposes of the Federal Power Act to mean "any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing . . ." (Act of June 10 1920, c. 285 § 3, 41 Stat. 1063, as amended by Act of August 26 1935, c. 1935, c. 687, Title II, § 201, 49 Stat. 838; 16 U S C § 796 [3]).

The Act of June 25 1938 (c. 676, 52 Stat. 1060), known as the Fair Labor Standards Act, in its definition of "person" provides in § 3 (29 U S C § 203[a]):

> " 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons."

The Second Circuit Court of Appeals naturally gave decisive importance to this settled course of Congressional treatment of the term "corporation" (149 F [2d] at 913; R 54). Petitioner's attempt to dispose of this course of treatment by urging that the failure of Congress similarly to amend the "assignee clause" shows an intention to leave to judicial construction the word "corporation" therein, and also shows the satisfaction of Congress with the decisions of the Sixth and Eighth Circuit Courts of Appeals as petitioner interprets them (brief pp. 11-2), is so obviously groundless as to require no discussion.

Conclusion

The decision of the Second Circuit Court of Appeals herein clearly accords with the statutory limitation imposed by Congress upon the jurisdiction of the Federal courts, and does not call for review in this Court. Petitioner's claim that the Massachusetts trust of which she holds debentures, is an "instrumentality" of the defendant, must under the rule of *Erie R. Co.* v. *Tompkins* be determined according to New York law in any event. It should be determined by the courts of New York.

Respectfully submitted,

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New York, October 11 1945.